American National Insurance Company *and* Shirley A. Collins. Cases 10-CA-15005 and 10-CA-16393

24 August 1983

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 3 January 1983 Administrative Law Judge Hutton S. Brandon issued the attached Decision in this proceeding. Thereafter, the Charging Party filed exceptions[1] and a supporting brief,[2] and Respondent filed a reply brief.[3]

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[4] and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

IT IS FURTHER ORDERED that the informal settlement agreement in Case 10-CA-15005 be, and it hereby is, reinstated.

[1] The Charging Party excepts only to the Administrative Law Judge's findings and conclusions regarding the discharge of the Charging Party, and to his recommendation that the informal settlement agreement previously entered into in Case 10-CA-15005 be reinstated.

[2] The Charging Party has requested oral argument. This request is hereby denied as the record, the exceptions, and the briefs adequately present the issues and the positions of the parties.

[3] In its brief, Respondent requested that the Board dismiss the Charging Party's exceptions for failure to comply with the requirements of Sec. 102.46 of the Board's Rules and Regulations, Series 8, as amended. We hereby deny Respondent's request since the Charging Party's exceptions are in substantial compliance with Sec. 102.46.

[4] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

DECISION

STATEMENT OF THE CASE

HUTTON S. BRANDON, Administrative Law Judge: This case was tried at Knoxville, Tennessee, on October 5 and 6, 1982. The charge in Case 10-CA-15005 was filed by Shirley A. Collins, an individual, herein referred to as Collins, on September 12, 1979, amended December 10, 1979, alleging that American National Insurance Company, herein called Respondent or the Company, violated Section 8(a)(1) and (3) of the National Labor Relations Act, as amended, herein called the Act. The charge in Case 10-CA-16393 was filed by Collins on November 4, 1980, alleging that Respondent violated Section 8(a)(1) and (3) of the Act in the discriminatory discharge of Collins on October 17, 1980. The complaint based on that charge issued on March 10, 1982, alleging that Respondent discharged Collins on October 17, 1980, because of her membership in, and activities on behalf of, Insurance Workers International Union, AFL-CIO. An informal settlement agreement which had been executed by the parties on November 4, 1979, and approved by the Regional Director on November 12, 1979, in Case 10-CA-15005 was set aside by the Regional Director on April 26, 1982. Thereafter, an Order Consolidating Cases, and amended consolidated complaint and notice of hearing issued on April 29, 1982, incorporating the allegations of unlawful discharge of Collins involved in Case 10-CA-16393 with a number of allegations of Section 8(a)(1) and (3) violations of the Act involved in Case 10-CA-15005 all occurring in August and September 1979. The primary issues are whether or not Collins was discharged for her union activities,[1] and whether or not the settlement agreement in Case 10-CA-15005 was rightly set aside.

Upon the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by the General Counsel and Respondent, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent is a Texas corporation with an office and place of business located in Knoxville, Tennessee, where it is engaged in the sale and service of insurance contracts. During the calendar year preceding issuance of the complaint herein, Respondent received from policyholders insurance premiums valued in excess of $500,000 of which in excess of $50,000 represented premiums received from policyholders located outside the State of Tennessee. The complaint alleges, Respondent in its answer admits, and I find that Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

The complaint further alleges, Respondent in its answer admits and I find that the Insurance Workers International Union, AFL-CIO, herein called the Union, is, and has been at all times material to the case, a labor

[1] The consolidated complaint contained an allegation that Respondent, subsequent to the discharge of Collins, discriminatorily caused another employer not to hire her. Respondent's objection to hearsay evidence presented by the General Counsel to support this allegation was sustained. No other evidence substantiating the allegation was produced and no argument on the matter was contained in the General Counsel's brief. Accordingly, in the absence of supporting evidence, it will be recommended that this allegation be dismissed.

organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

Respondent has had a collective-bargaining relationship with the Union which represents its employees at its district offices nationwide, including its Knoxville office herein involved, since 1949. It appears, however, that notwithstanding the existence of an applicable bargaining agreement union membership and support among Respondent's Knoxville employees had been dormant for several years prior to August 1979. In August 1979, however, employee Collins contacted an official of the Union and subsequently a meeting was arranged between Union Representative Soileau and several of Respondent's Knoxville employees on or about August 12, 1979. Employees attending the meeting signed membership cards, and interest in union activities was revived. Collins was selected as chairman of the local grievance committee and also secretary of the local union.

Respondent quickly became aware of the revival of union interest among its employees, although the record is not clear precisely how it achieved such awareness. A discussion between then Staff Manager Larry Sheetz and employees, including Collins, at a regularly scheduled staff meeting on August 14, 1979, included talk of the Union. Scheetz' remarks at that meeting, as well as certain other conduct by Sheetz and Respondent's then district manager, J. C. Combs, who headed the Knoxville office, provoked the filing of the charge in Case 10-CA-15005. The allegations involving Sheetz and Combs were resolved in the settlement of that case and were revived through the Regional Director's withdrawal of approval of the settlement agreement on April 26, 1982. Those allegations, which were incorporated in the consolidated complaint herein, are set forth below.

B. *The Alleged 8(a)(1) Violations in Case 10-CA-15005*

Collins testified that at the meeting with his staff on August 14, 1979, Sheetz inquired as to how many of the employees had signed union cards. Moreover, he told the employees, still according to Collins, that, if the employees had grievances, they should have brought them to him, and he would have taken care of them. Collins' testimony in the foregoing respect is corroborated by that of former employee Verna Jean Bates. Bates added in her testimony that Sheetz said that he felt the employees had made a mistake and were wasting money paying union dues, that he did not think that having organized a Union would change the working conditions at the Company, and that it was going to cause hostility. Sheetz then asked what complaints the employees had and then wrote them down. Bates further added that Collins asked Sheetz if he were threatening the Union, and, if so, the employees were not going to answer his questions or cooperate. Sheetz replied that he did not care how they felt, and remarked he wanted to know, and, after he got the information he wanted, he dismissed the meeting.

Sheetz, in testifying for Respondent, admitted the questions attributed to him at the August 14 meeting, and also that he asked employees about what grievances they had.

The complaint alleges that Sheetz unlawfully interrogated employees in violation of Section 8(a)(1) of the Act and unlawfully solicited grievances and promised to adjust them if the employees refrained from joining or engaging in activities on behalf of the Union. Based on the undisputed testimony, it is clear that his questioning the employees as to whether they had joined the Union constitutes conduct which has an inhibitory effect on employees' union activities and is normally found to be violative of Section 8(a)(1) of the Act. Actual coercion is not the test in determining the violative nature of the questions. See *Hanes Hosiery*, 219 NLRB 338 (1975).

Similarly, the solicitation of grievances in an effort to discourage union activity has been held by the Board to constitute interference with employee rights under the Act. See e.g., *Reliance Electric Co.*, 191 NLRB 44 (1971). Sheetz' remarks constitute an observation that grievances may have been resolved without union involvement if complaints had been made to him initially. That remark obviously was intended to undercut or diminish union support. Accordingly, it would constitute a solicitation of grievances normally considered unlawful under Section 8(a)(1). The impact of the remark, in context, was significantly lessened since the employees at that point in time had already drawn up a list of grievances which they wished to present to District Manager Combs as will be discussed further below. Cf. *Uarco*, 216 NLRB 1 (1974).

The consolidated complaint further alleges that District Manager Combs unlawfully interrogated employees on August 14 and 17 and threatened them with discharge on September 2, 1979. No evidence of an unlawful threat of discharge was produced at the hearing, and the General Counsel's brief contains no argument with respect to any threat of discharge. The record reveals only one incident of interrogation attributed to Combs and that, related in the testimony of Collins, allegedly took place on August 17. In this regard, Collins testified that, in a staff meeting on that day in the conference room, Combs entered the meeting and "wanted to know how many agents had joined the Union." There apparently was no response, and Combs stated that he would find out who joined the Union when they started taking out the union dues from employees' paychecks. Combs did not specifically contradict Collin's testimony. On the contrary, he admitted that he had asked some of the employees around the office if they had joined the Union. He explained that he sought to encourage the employees to join the Union because he wanted everybody "on the same team." In the absence of specific contradiction, I credit Collins' testimony on the point and find that Combs did inquire of employees with regard to their union membership and support. In Collins' testimony, such inquiries were not specifically accompanied by any encouragement to join the Union. Accordingly, Combs' questions, I find, reasonably tended to be coercive and interfered with employees' Section 7 rights.

C. *The Alleged 8(a)(3) Violations Involving Changes in Working Conditions*

At the conclusion of the staff meeting on August 14, Collins advised Sheetz that she and two other union committee people, Carol Johnson and James Mason, wanted to meet with Combs. Thereafter, the three did meet with Combs in his office where Collins advised Combs that they had joined the Union, that they had a union contract that they wanted to go by, and handed Combs a list of 23 grievances. Collins began reading through the grievances, but after going only half-way through, Combs stated that that was all the time he had to discuss it with them that day, and told the three to get out.[2]

It was after the meeting with Combs that Respondent allegedly altered the working conditions of the employees in violation of Section 8(a)(3) of the Act. The alleged changes involved Respondent's removal of locks from employee lockers, the taping of a list of company procedures on the desk of the union members, a change in the method by which the employees received "mail-in" payments of premiums, an institution of an alleged procedure of delay in employees' receiving their telephone messages, and an attempt to rearrange boundaries of agents' debits.[3]

With respect to the removal of locks, the record reflects that employees maintained lockers at Respondent's offices wherein they kept personal effects as well as company records. Initially, all of the employees had locks on their lockers, and the Company maintained a set of keys for the lockers for access to the records kept therein when necessary. However, over a period of time locks were lost and fell into disuse so that, by August 1979, only employee Mason maintained a lock on his locker. Mason testified that he was actually using two lockers and had two locks on those lockers. However, around August 17, he found that the locks had been removed from his locker. He inquired of Sheetz about the locks, and Sheetz told him they had been removed at Combs' direction, and they would not be put back on. Mason filed a grievance on the matter, and, as a result of the grievance, Respondent put new locks on all the lockers with Respondent keeping a key so that it would have access to the lockers in the absence of employees who spent substantial portions of time in their debits selling insurance and collecting premiums. Combs, in his testimony, explained that the existing locks were taken off because the Company had no keys, thus no access to records maintained in the lockers in the event of a death claim or disability claim while an agent was not in the office. According to Combs, the policy information was only obtainable from the agents' records. After the grievance was filed, the matter was resolved with the Company installing new locks on all the lockers. It is not clear from the record exactly when such new locks were installed.

The General Counsel argued that the removal of the locks was retaliatory to the employees' union activities. The Company, through its witnesses, however, denied that any union considerations were involved in the removal of the locks. It is clear that the record reflects that only one employee out of approximately 12 employees employed by Respondent at the time was affected by the removal of the locks. That was Mason. No other employees were shown to have been utilizing the lockers with locks on them. Under these circumstances, I can find no general alteration of employees' terms and conditions of employment, and the mere timing of the removal of the locks without more does not establish that the action was discriminatorily motivated. See *Lasell Junior College*, 230 NLRB 1076 (1977). While Respondent may well have been surprised with respect to the revival of the Union at the Knoxville location and engaged in some interrogation, the fact remains that it was already bound by the Union's collective-bargaining agreement. Retaliation would appear to serve no useful purpose. Because only one employee appears to have been directly affected by such removal of the locks, and because of Respondent's need for access to the lockers, a need which was not contradicted by the General Counsel's evidence, I find that Respondent's action in removing the locks was not discriminatory and not violative of the Act.

Regarding the delay or failure to receive telephone messages, Collins testified that at one point in time shortly after the employees joined the Union, they stopped receiving their telephone messages from customers. Collins testified that ordinarily such messages were kept in folders for each agent on a counter in the office where agents would pick up the messages when they returned to the office. She testified, however, regarding only one specific instance where a customer complained to her about Collins not returning her phone call. Former employee Verna Bates, testifying in support of Collins, related that the removal of the folders containing telephone messages and "mail-ins" from the office counter, took place immediately after the Union was activated. Thereafter, employees had to go to the staff manager to get their telephone messages and "mail in." Boter testified Sheetz told the employees the procedure would remain that way, but did not explain why. A grievance was filed on the matter, and, according to the testimony of employee James Mason, as a result of the grievance, the folders were put on the employees' desks.

Combs acknowledged in his testimony that he had changed the location where the folders were maintained by putting the folders in the staff manager's "pigeon hole." He explained that a change was made in order to ensure that the staff manager had the information which was going to the employees.

Combs insisted that information in the folders was available to the employees through the staff manager. He claimed that he made this change because under company rules the information contained in the folders was to be distributed to the staff manager who then disseminated the information to the employees or agents. The pur-

[2] Both Collins and Combs had no experience in grievance processing. Apparently, Collins expected immediate responses and action by Combs on the grievances. She testified that it was not until sometime later that she learned that Combs had 7 days under the collective-bargaining agreement in which to reply to the grievances.

[3] A debt is defined in the record as the territory serviced by an individual agent or employee.

pose was to allow the manager to know what was going on. He further explained that, if the folder had remained on the counter, the staff manager might not have had all the information if an agent came into the office and picked up a folder before the staff manager did. He denied that he was seeking to block employee access to the information, and pointed out that a failure or refusal to get the information to the individual employees or agents would hamper Respondent's operations and work to the detriment of its business. Moreover, since the commissions of the staff manager and district manager are directly related to the production of the agents, their income would be adversely affected by such a change.

I conclude that the record does not establish a change of employee working conditions in Combs' actions with respect to the agents' access to the folders. At most, the record establishes Collins missed one telephone message, and she and other employees may have experienced some delays in receiving messages and "mail-in" premiums. The delays appear to have been insignificant, however. In my opinion, the so-called change here constituted only a minor alteration of office procedures which was not shown to have been designed to adversely affect employees' working conditions as a response to their union activities.

Collins also testified that shortly after the Union was activated, Staff Manager Sheetz taped certain written instructions on the desks of union members, while such instructions were not taped on the desks of other employees and agents. The General Counsel argues that such action constituted a discriminatorily motivated change in employee working conditions. However, there is absolutely no evidence that the written "instructions" in any way changed existing office procedures. According to Sheetz, the "instructions" were actually a schedule of procedures which were already in existence and known to the employees. The taping of material on the desks was simply to remind the employees of those procedures. Moreover, Sheetz testified the material was taped on the desk of all of the employees on his staff without regard to their union involvement. Sheetz conceeded that the taping of the material to the desks was his idea and was not applicable to the employees working under different staff managers. I find Sheetz' testimony and explanation on the matter credible and reasonable. Accordingly, I find no discriminatory change by virtue of taping the material, whether referred to as instructions or a schedule, to the desk of employees on Sheetz' staff.

In connection with the changing of the debits of the employees, Collins testified that about 3 weeks after the employees signed union cards, a map was put on the wall in the office outlining new debit boundaries. Collins found that her debit was cut by about one-fourth to one-third of its original size, while the bounderies of Mason's and Carol Johnson's debits were also affected.[4] Combs explained to the employees that the boundaries were being changed because he was opening up a new debit. Collin filed a grievance on the matter, and it was taken up with Respondent's regional director in Atlanta. In a visit to the Knoxville office, the regional director allowed the employees to redraw boundaries of their debits, "restoring" them to their original locations. Mason's testimony generally supported Collins' except that Mason's testimony added that it was Respondent's policy not to change the debit without consent of the employees servicing the debit. Further, Mason testified that Combs told him that he would take part of Mason's debit anyway, and while Mason could service his old debit, he would not be allowed to write any new insurance in the territory that Combs was going to take to expand into another debit.

Combs testified for Respondent that, when he became district manager in Knoxville, the boundaries of the debits of employees were not clearly defined. Combs explained that he had hired a number of new people, and, if he did not know the bounderies of the debits, he could not explain to them the boundaries of their debits. Accordingly, he sought to establish boundaries and discussed it with each of the employees. The boundaries were finally established with the help of the regional director. Combs denied that his efforts to define the boundaries had anything to do with the fact that the Union had become active.

It is quite clear that a change in the debits would be a change which would affect the employees' terms and conditions of employment because it bore directly upon the area within which an employee could solicit sales to prospective policyholders. However, I am not persuaded that this record establishes that Respondent effectuated a change in the debits prior to a grievance being filed on the matter. The record reflects that Combs only sought to establish or change the debits from the way the employees understood them and operated them. Thus, Mason testified that there was no way his debit could be taken from him without his consent under Respondent's rules. Moreover, he refused to sign a statement giving consent to giving up a portion of his debit. And while Combs, according to Mason, threatened to take Mason's debit anyway, Mason testified that, because of the filing of the grievance, his debit was not taken. Accordingly, I conclude that there was no actual alteration of the debits, and there was only a threatened or proposed change in debit boundaries. Since there was no actual change in the debits, there was no change of employees' terms and conditions of employment in violation of Section 8(a)(3) of the Act.

D. *The Alleged Unlawful Discharge of Collins*

Collins was employed by Respondent in November 1978 and worked as an insurance agent selling insurance and collecting premiums in her assigned debit. She was discharged on October 17, 1980, according to Respondent, for violating a company policy against outside or secondary employment, a reason which the General Counsel contends was pretextual and designed to cloak the real reason for the discharge, Collins' union activities.

Collins' involvement in the reactivation of the Union at Respondent's Knoxville office has already been noted. She testified that from the time the Union was reactivated until the time of her discharge in her capacity as

[4] The record does not reflect the extent the income of the employees would be affected by a change in debits.

union committee chairman, she processed approximately 150 grievances, including the 23 grievances initially presented to Combs on August 14, 1979. It appears, however, that the vast majority of these grievances were filed and processed during the first few months after the Union's reactivation. Further in this regard, Collins testified that the last grievance she filed prior to her discharge was filed in June, 3 or 4 months prior to her discharge. While Collins testified that most of the grievances were resolved through Respondent's home office rather than locally, it appears that such resolutions were generally favorable to the Union. No particular grievance or group of grievances was shown to have generated any significant animosity between Respondent and Collins.

Collins conceded that she was aware of Respondent's policy against outside employment, and confirmed that such policy was set forth in her agency contract and also in the collective-bargaining agreement between Respondent and the Union. She further conceded she was aware that the policy extended to any part-time employment. Collins admitted that she had been licensed by the Tennessee State Board of Cosmetology in 1976 as a beautician and had annually renewed her license. She testified that, in the summer of 1980, she considered establishing her own beauty shop, and to this end she purchased a small building which she had moved to the premises of her home to use as a shop. Further, during July and August, she purchased equipment for the beauty shop and had it installed. Finally in July, she obtained a business license for the shop which she posted in the shop along with her cosmetology license.

While Collins had applied for a shop license at the time of her discharge, an inspection necessary for the license had not been conducted. Collins testified that she had advice from friends not to open the shop, so she had decided to just let it "sit there." Collins admitted that, while she had not opened her shop, she had done work on the hair of two of Respondent's employees, Carol Johnson and Verna Bates, and one additional person. While Collins claimed she did not make a specific charge for Bates and Johnson for such services, both left her money for the work she had performed on their hair. She admittedly did charge a third person a fee for services rendered. Collins performed these services for Bates and Johnson and the third lady either in the kitchen of her house or in her shop. The services were performed during the month prior to Collins' discharge.

With respect to the details of her discharge, Collins testified that on October 3, 1980, Sheetz[5] called her into his office in the presence of employees Carol Johnson and James Mason, and told Collins that he knew that she had a beauty shop in her yard. He then asked Carol Johnson if Collins had fixed her hair. Johnson responded affirmatively. Sheetz also said that he had found out Collins had made application for a shop license. He then asked her to resign and, apparently upon her refusal to do so, he told her she was discharged. Collins, knowing that Sheetz did not have authority to fire employees,[6] picked up her debit book and walked out of the office.

Apparently, Collins continued to work. She was called into Sheetz' office again on October 10, where Sheetz again, in the presence of Mason, asked her to resign. Collins denied that she was operating a beauty shop and again refused to resign. She continued to work until October 17 when Sheetz again called her in and told her she was terminated for, according to Collins, "taking money" for fixing hair.

D. *The General Counsel's Argument and Evidence of Disparate Treatment of Collins*

The General Counsel contends that Respondent's asserted reason for the discharge of Collins was pretextual, and the real reason was her union position and activities. In support of this contention the General Counsel points to Respondent's initial response to the Union's reactivation by engaging in unlawful acts previously discussed which assertedly revealed deep union hostility by Respondent generally and Sheetz in particular. Moreover, Sheetz' admitted eagerness to discharge Collins, and his failure to ascertain any mitigating circumstances, including the fact that Collins had not actually opened up her shop, is said by the General Counsel to further reflect the presence of an ulterior motive in the discharge and an effort to seize upon the first grounds available to effectuate the discharge of Collins. Finally, on the basis of the evidence discussed below, the General Counsel asserts that Respondent disparately applied its policy against secondary employment to Collins, further revealing the hollowness of the claimed basis for the discharge.

With respect to the disparate application of the rule against secondary employment, Collins testified that in February 1980 Sheetz had offered to fill out her income tax form for her at the rate of $5 per schedule form. Collins apparently did not take him up on the offer. Former employee Paul Mynatt, Jr., testified that Sheetz filled out his income tax for him prior to Mynatt's discharge in 1979 and charged Mynatt $40. Mynatt conceded, however, that he had not paid Sheetz for the work because he claimed he had to do the work over. Verna Bates testified that sometime prior to the union activity starting, Sheetz had been with her on her debit where the two had discussed a flower shop business which Sheetz said he and his wife had. Sheetz had told Bates that he had hoped that it would have been a profitable business investment, but that it had not worked out, and he was in a bind for a loan he had acquired to start the business.

Mason testified that he had a conversation with Sheetz sometime in 1979 when Sheetz was with Mason on Mason's debit, and Sheetz had stated that he had sold a certain doctor some flowers in connection with the flower business. Sheetz added that he might as well sell the doctor some insurance too. In the same discussion, Sheetz had said that he had one flower shop open and was going to open perhaps three more, one in each part of town.

[5] Sheetz had become district manager for Respondent after Combs was transferred to another city in December 1979.

[6] Respondent concedes that district managers do not have authority to fire employees without specific approval of the home office.

Former employee Paul Peck testified that while he worked for Respondent from May 1981 until June 1982, he engaged in secondary employment by working at a flea market, selling crop insurance and property and casualty insurance, and working in a musical band. Peck said that he assumed Sheetz was aware of this secondary employment because it was common knowledge in the office. Moreover, Peck, who admitted that he was aware of the Company's policy against secondary employment, testified on direct examination that Sheetz once told him, with regard to his selling other insurance, to "keep it quiet." On cross-examination, however, Peck appeared to contradict that by saying that, when Sheetz learned that Peck was licensed to sell other insurance, he came to Peck and asked him to resign such licenses, and he did so.[7] Moreover, Peck further indicated on cross-examination that Sheetz' remark, with respect to "keeping it quiet," was made after Sheetz had called Peck into his office following a discussion in the agents' room about "his flea market activities and tobacco crop insurance."

Former agent Melvin Hayenga who was employed from October 1981 to August 1982 testified that he was not aware of the Company's policy against outside employment until sometine after he was employed. He related that because Respondent did not sell property or casualty insurance or automobile insurance, he sold such insurance through other companies during the time he was employed by Respondent. He said that he and Sheetz had talked about it at one time, and Sheetz had asked him to withdraw his certificates of authority that he had from other companies to sell insurance. While Hayenga did withdraw certificates of authority from three companies, he failed to do so with respect to two others. He admitted that Sheetz told him that he could be discharged by the Company if they knew that he was selling other insurance.

Finally, employee Danny Johnson testified that, while he was employed by Respondent, he had engaged in trading guns and jewelry and had also opened up a produce stand in Lenoir City, Tennessee. Johnson testified that Sheetz was aware of his produce stand because Sheetz had bought some produce from him at one time while out on Johnson's debit with him. Moreover, he said that another staff manager, William Pridemore, had knowledge of the stand and had told Johnson that he would not tell Sheetz about the stand. Johnson further testified that employee brothers, Denver and Albert Dugger from Johnson City, Tennessee, frequently came to Respondent's office in Knoxville, Tennessee, where they sold records and albums of gospel music that they had made.

F. *Respondent's Evidence and Position on Collins' Discharge*

Respondent's position with respect to the discharge of Collins was related primarily through Sheetz and in correspondence between Scheetz and Respondent's assistant vice president, William J. Bobb. Sheetz testified that Collins' production had declined substantially during the year proceeding her discharge. Sheetz related, however, that he did not know anything about Collins' beauty shop until he overheard employee Carol Johnson tell another employee that she had had her hair done at "Shirley's shop." Sheetz thereafter called Johnson into his office and asked her about the matter, and Johnson related to him that Collins had done her hair for $25. Upon further questioning, Johnson revealed that Collins had a beauty shop wherein she had a license hung up with a price list for services. After the revelations of Johnson, Sheetz questioned Collins about the matter, but Collins denied there was a shop. Sheetz wrote the State Board of Cosmetology on September 25 inquiring about both Collins' beautician license and shop license.[8] He also ascertained on October 3 from local offices that Collins had a business license for "Shirley's Hair Fair." Sheetz communicated his finding regarding the tax license to Bobb telephonically and also in writing by letter also dated October 3.[9] In another letter to Bobb, dated October 3,[10] Sheetz reported on a telephone conversation with personnel in the State Board of Cosmetology who confirmed that Collins had applied for a license for a beauty shop.[11] Sheetz wrote two additional letters to Bobb dated October 3. In one,[12] Sheetz complained about the fact that Collins had been absent from her debit from September 30 through October 2 without permission. He reported in the letter that Collins had told him on October 3 that she had an accident and underwent medical treatment at a local clinic, but, when he checked that out with the clinic, he found that she had received no such treatment.[13] In the other letter,[14] Sheetz set forth the poor production record of Collins in the preceding year, and suggested that the problem could not be remedied by retraining since Collins had already been with Respondent 2 years. Sheetz' letter further observed that Collins' outside interest was taking too much of her time and causing her to neglect her duties with the Company. The record does not show the order in which Sheetz' October 3 letters were prepared. However, Sheetz' testimony was that he read them to Collins. Collins did not contradict this in her testimony.

On October 6, Sheetz again wrote Bobb complaining that Collins had left the office early on October 3 without permission in order to prevent Sheetz from calling her account.[15] The letter stated that Sheetz had subse-

[7] A license was not required for the selling of crop insurance at the time.

[8] Resp. Exh. 17.

[9] Resp. Exh. 18.

[10] Resp. Exh. 19.

[11] This was apparently after the Board had received Sheetz' written request for this information. The Board had declined earlier to respond except to an inquiry in writing.

[12] Resp. Exh. 2.

[13] Asked about her absence in late September on cross-examination, Collins conceded she had taken off without permission. She acknowledged that she had told Sheetz she hurt her ankle and she had gone to the clinic for treatment, and that Sheetz had later told her he had checked and found out she had not had treatment. However, her memory was uncharacteristically poor on whether Sheetz had shown her a copy of the letter in which he set forth the details of this matter to Bobb and which he asked her to sign.

[14] Resp. Exh. 3.

[15] Resp. Exh. 21. Calling an account was defined as checking an agent's book to ascertain whether the amounts of moneys collected and remitted by the agent agreed with the amount left outstanding and uncollected.

quently arranged for Collins to meet on October 6 to call her account. However, on October 7 Sheetz by letter[16] reported to Bobb that Collins had failed to appear on October 6, and Sheetz complained about Collins' unwillingness to cooperate—"doing what she pleased without being reprimanded."

A letter dated October 6 from the State Board of Cosmetology confirmed to Sheetz in writing that Collins on September 22 had applied for a shop license. By letter dated October 13,[17] Sheetz advised Bobb that he had proof that Collins had income from a beauty shop operation and related that Collins had charged two patrons for her services. Sheetz also stated he had proof that Collins left town on September 30 without permission to attend her son's graduation from boot camp. Sheetz requested that he be authorized to terminate Collins by October 17.

Apparently Sheetz' October 13 letter crossed in the mail with a letter[18] from Bobb bearing the same date in which Bobb responded to Sheetz' earlier letters. Bobb's letter observed that if the Company had proof Collins was working in a beauty shop, it would have no alternative but to discharge her. The letter also noted that Collins' production record was "extremely unsatisfactory," and remarked that Collins' leaving the office on October 3 to avoid having her account called constituted "insubordination." The letter recommended that Sheetz meet with Collins, read her the letter, and advise her that any further instances of insubordination would result in termination.

Sheetz testified he told Collins on October 3 he was going to see if the Company would not terminate her. He testified further that after his letter of October 13 to Bobb, Sheetz telephoned Bobb regarding Collins' discharge but found he was not available. In place of Bobb, he talked to R. A. Banks, executive vice president of Respondent. Banks authorized the discharge of Collins and confirmed that by letter dated October 16.

Sheetz testified that he had learned from Carol Johnson that Collins had also performed services for Bates for pay, and, subsequent to the discharge, he asked both Bates and Johnson to sign statements regarding services provided to them by Collins. They both did so.[19] In addition to the statement she gave Respondent in which she related that Collins had charged her $25 to do her hair, Sheetz testified that Carol Johnson also told him that Collins was scheduling her work activity for Respondent around her beauty shop appointments.

With respect to the General Counsel's evidence concerning disparate treatment of Collins compared to other of Respondent's employees doing outside work, Sheetz denied that he was aware of the instances of outside employment. Thus, he denied knowledge of Danny Johnson's operating a produce stand or dealing in guns and jewelry. Moreover, he specifically denied buying anything from Johnson's stand, although Sheetz did recall buying some ears of corn from a neighbor of Johnson's mother on an occasion when he was working with Johnson in the Lenoir City area. Sheetz testified that when it was discovered that Johnson had written other insurance while employed by Respondent, Johnson was terminated. On balance, Sheetz impressed me as more credible than Johnson, whose testimony was at times vague and equivocal. Further, while he testified that Staff Manager Pridemore was aware of his produce stand, he also testified that Pridemore had told Johnson that he would not tell Sheetz. If Sheetz had been aware of Johnson's operation as Johnson claims, there would have been no reason for Pridemore to make such a remark. On the other hand, the remarks attributed to Pridemore reflect that he would have anticipated reaction by Sheetz if Sheetz acquired such knowledge of Johnson's secondary employment.

Sheetz admitted that he had been aware of the activities of Denver Dugger and Dugger's involvement in record sales. On initially hearing of such activities, however, he had inquired of Dugger about the matter, and Dugger told him, according to Sheetz, that all the proceeds were going to a church. Thus, there was no "for profit" activity. Moreover, Sheetz credibly denied that he had observed any selling of records by Dugger at the Knoxville office.

With respect to the outside employment of Peck, Sheetz testified that he had heard Peck make statements about involvement in flea market activities. As a result, he called Peck into his office and asked Peck about it. Peck assured him that it was all handled by his wife and the license for the business was in his wife's name. Sheetz admittedly told Peck to keep quiet about it because he did not want Peck giving people the idea that he was engaged in flea market activity when he was not in fact so engaged. Sheetz denied that he ever knew that Peck was involved in selling crop insurance at anytime. He did not suspect that Peck was licensed to sell insurance for other companies, but, upon inquiry to the insurance commissioner, Sheetz found that Peck did have other licenses. As a result, and upon Peck's assuring him that he was not doing anything with such licenses, he had letters prepared for Peck canceling the licenses. Sheetz impressed me as sincere in his testimony on the subject, and I found him a generally candid and credible witness. His testimony regarding Peck was plausible and reasonable. His denial of knowledge of Peck's involvement in selling crop insurance, an unlicensed activity, re-

[16] Resp. Exh. 22.

[17] Resp. Exh. 25

[18] Resp. Exh. 26.

[19] Bates signed her statement on October 24, stating that Collins did beautician work for her and had charged her $12. Bates testified for the General Counsel that Carol Johnson had encouraged her to give the statement. However, Johnson did not herself sign a statement concerning Collins' services to Johnson until October 30. It was stipulated by the parties that Johnson appeared at the hearing, but she was not called by any party. Bates in her testimony sought to retract the statement she had given Respondent regarding Collins by saying that she did not realize the impact or understand it. Instead, she testified that the money she gave Collins for doing her hair was a gift. I find Bates' testimony on the point unconvincing and incredible. I conclude that Bates was well aware of what she was signing for Respondent and that her only concern was with possible disclosure of her statement, not with the truth of what was contained in it. Even though Johnson did not sign her statement until later, Bates testified Johnson encouraged her to give the statement to Sheetz reminding Bates, "It is true, Jean."

ceived support from the fact that he sought to have Peck cancel any existing authority to sell other insurance. If Sheetz had been unconcerned about Peck's selling of other insurance whether pursuant to a license or not, it would have been unlikely that he would have had Peck cancel his licenses, thus removing any temptation for Peck to sell other insurance. Accordingly, I credit Sheetz where his testimony contradicts Peck.

I also find Sheetz' testimony more credible than that of Hayenga. Sheetz testified that when he hired Hayenga he was aware that Hayenga had been in the insurance business with an agency of his own, and Sheetz explained to Hayenga Respondent's policy against other employment Hayenga told Sheetz that he would transfer his other business to his wife. About 3 weeks after he was hired, however, Sheetz received a telephone call for Hayenga inquiring about automobile insurance, a type of insurance not sold by Respondent. Suspecting that Hayenga had not transferred his old business to his wife, Sheetz inquired of Hayenga about the matter, and Hayenga said he just had not had time because his work with Respondent was taking all of his time, but that he would take care of the matter. Subsequently, in May 1982, Sheetz ascertained that Hayenga still maintained licenses with other companies and asked Hayenga if he were doing anything under those licenses. Hayenga stated that he was not, and, as in the case with Peck, Sheetz had letters prepared for Hayenga's signature cancelling such licenses. Upon receiving another telephone inquiry for Hayenga concerning automobile insurance in August 1982, Sheetz called Hayenga into his office assertedly to terminate him, but Hayenga stated that he would resign, and Sheetz allowed him to do so. In addition to finding Sheetz more credible than Hayenga on general testimonial demeanor, I find it basically incredible that Sheetz would knowingly allow Hayenga to continue to sell other insurance. Such knowledge would be wholly inconsistent with Respondent's normal policy and also with Respondent's action in discharging Danny Johnson the preceding year upon acquiring knowledge that he had sold other insurance while employed by Respondent. It would also be inconsistent with Scheetz' efforts to have Hayenga's licenses with other companies canceled.

In response to accusations that he himself had engaged in secondary employment while working for Respondent, Sheetz denied that he had ever charged or received payment from employees for assisting them with the filing of their income tax returns, although he conceded that he had helped a number of employees in this regard. He specifically denied that denied that he charged Mynatt $40 for assistance in this regard. I find Sheetz' denials credible. Mynatt, because of his discharge by Respondent could not be regarded as being without bias. Moreover, the fact that Mynatt admittedly never paid Sheetz any money supports Sheetz' position that there was no charge. With respect to the accusation by Collins, Sheetz impressed me as more credible generally than Collins. Collins' equivocations regarding the reason she asserted to Sheetz for her absence in early October, coupled with her failure to specifically contradict Sheetz' testimony regarding his discovery that the reason she had related to him for such absences were in fact false, demonstrates at least that Collins was lacking in candor.

With respect to his own involvement in the operation of a flower shop while employed by Respondent, Sheetz related that when he transferred back to Respondent's Knoxville office in mid-1978, he had considered quitting his job in order to open a flower shop. He discussed the matter with then District Manager Combs who talked him out of resigning. Instead, Sheetz' wife opened the shop and did all work in connection with the shop, although Sheetz secured loans for the shop and financed it until it failed after about 6 months. Sheetz denied that he worked in or for the shop while employed by Respondent. He likewise denied the remarks attributed to him by Mason, although he conceded that he had a conversation with Mason in which the sale of flowers to a doctor was mentioned. However, in Sheetz' version he said he told Mason only that his wife had sold flowers to the doctor, whose name he could not recall, and Sheetz had sold the doctor insurance. In fact, however, the sale of insurance was never actually consummated. It is difficult to believe that either Sheetz or Mason could be totally accurate regarding a casual remark occurring in a conversation taking place 3 or 4 years prior to the hearing. I believe Sheetz' version to be more accurate. As already indicated, I found Sheetz to be a generally credible witness. Moreover, Mason failed to include the statement he attributed to Sheetz in his affidavit given to the Board's investigator in the case although he was specifically asked about other examples of secondary employment by Respondent's employees. Considering the foregoing, I find that there is no evidence of disparate treatment of Collins regarding outside employment.

G. *Conclusion*

In view of the foregoing credibility resolutions and based on the record considered as a whole, I am not persuaded that the General Counsel has met the requirements of establishing a violation of the Act as set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981). In short, based on the credited evidence, I do not believe the General Counsel has set forth a *prima facie* case that Collins' discharge was based on union considerations. I note first of all in this regard that the 8(a)(1) violations by Respondent upon which the General Counsel relies to establish Respondent's union animus occurred more than a year prior to Collins' discharge. This is too large a time frame to establish any meaningful connection between the alleged "animus" reflected in the 8(a)(1) violations and the discharge of Collins. Cf. *Chattanooga Glass Co.*, 265 NLRB 97 (1982). Further, there was no showing that Collins engaged in any specific union activity at or near the time of her discharge which would serve to revive any union animus on the part of Respondent and provoke a discharge. Her last grievance had been filed approximately 4 months prior to her discharge, and was not shown to have engendered significant anger by Respondent which would serve to prompt retaliation. Finally, and in any event, the prior 8(a)(1) violations did not consist of any threats of retaliatory action so as to lend greater credence to a

theory of delayed retaliation. Rather, they were violations of a technical and comparatively innocuous nature raised in a context where Respondent had not only recognized the Union.

The General Counsel would seek to show union animus toward Collins based on Bates' testimony that Sheetz once remarked after the discharge of Collins that there were two people he wanted to get rid of, and he had gotten rid of one. Sheetz denied that statement, although he did candidly admit in his testimony that he had been determined to discharge Collins. I found Sheetz more credible than Bates and credit his denial. Moreover, even if he had made the statement attributed to him by Bates, it is ambiguous and fails to establish that union concerns were a motivating factor in Collins' discharge.

Based on the above, and because I have also found that the credited evidence does not establish disparate treatment of Collins, I find that a preponderance of the evidence does not establish that Collins' status in the Union or any other union activity of Collins was a factor in her discharge. Even assuming that the General Counsel has established a *prima facie* case, I am persuaded under the evidence, and the record considered as a whole, that Respondent has established that Collins would have been discharged without regard to her union activity. On the credited evidence, I conclude that Respondent had a policy against outside employment. It is clear that it applied that policy previously in the discharge of Danny Johnson who had written insurance for another company while employed by Respondent, even though such insurance, based on Johnson's testimony, was not competitive with Respondent. Moreover, on an occasion subsequent to Collins' discharge, and based on credited testimony of Sheetz, Respondent was prepared to apply its policy to Hayenga for failing to divest himself of other licenses and continuing to sell other insurance, although Hayenga was allowed to resign instead. Respondent had clear and uncontradicted evidence that Collins actually had established a beauty shop, had a business license for the shop, had performed services in the shop, and had charged customers for services, and, according to an oral statement of Carol Johnson to Sheetz, Collins was scheduling appointments at her beauty shop around her work for Respondent. Notwithstanding the fact that Collins' beauty shop was not competitive with Respondent's business, it nevertheless stood as a clear breach of Respondent's policy which Collins was well aware of. Under these circumstances, and based on the testimony of Sheetz, whom I credit, I conclude that Respondent would have discharged Collins irrespective of her union activities. Accordingly, I conclude that Respondent did not violate Section 8(a)(3) and (1) of the Act in the discharge of Collins.

Since I have found that Collins was not discharged in violation of the Act, it necessarily follows that Respondent engaged in no violations of the Act subsequent to the approval of the settlement agreement in Case 10-CA-15005. It therefore appears that Respondent did not breach the settlement agreement and that it was in error to set aside the settlement agreement. Accordingly, it shall be recommended that the settlement agreement in Case 10-CA-15005 be reinstated.

Having found that Respondent did not violate Section 8(a)(3) and (1) the Act in the discharge of Collins, I shall recommend that the complaint be dismissed in its entirety.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent did not violate Section 8(a)(3) and (1) of the Act in discharging Shirley A. Collins on October 17, 1980, or in any other manner alleged in the complaint.
4. Respondent engaged in no violations of the Act following approval of the settlement reached in Case 10-CA-15005, and it was, therefore in error to set aside the settlement agreement which should now be reinstated.

Upon the basis of the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[20]

The complaint is dismissed in its entirety.

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[20] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.